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No. 88-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

v.

JACK DUCKWORTH, Superintendent, Indiana State Prison, and INDIANA ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

I.

The gist of Respondents' Brief in Opposition is that none of the "new law" relied upon by Petitioner (hereafter, Defendant), impacts upon the "harmless error" determina-

tion of the Seventh Circuit. But this position disregards the simple truth that when that Court first determined [in *Jacks I—Jacks v. Duckworth*, 651 F.2d 480 (7 Cir. 1981)] that the constitutional error, if any, was "harmless," the prevailing law in the Seventh Circuit[1] was that a defendant's invocation of right to counsel was regarded as proper evidence of sanity. Thus, the initial "harmless error" determination was made in the context of a judicial climate that completely condoned such evidence and argument.[2] In such a climate, we submit, the "harmless error" determination was necessarily skewed by the tribunal's belief that no error had, after all, been committed. And the subsequent "harmless error" finding at bar is merely a "rubber-stamp" of the original one.

Now that Your Honors, in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), have determined that such use of a defendant's invocation of constitutional right to counsel violates due process of law, defendant is entitled to have his claim of constitutional error assessed by a tribunal not predisposed to find the error harmless because in reality it believes no error has occurred at all.

It appears painfully evident that no meaningful determination whether the error is harmless ever has been af-

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[1] Interestingly, had Defendant's initial habeas petition been presented within a federal judicial Circuit such as the Sixth or Eleventh, instead of the Seventh, he would long ago have been afforded relief. See *Wainwright v. Greenfield*, 474 U.S. 284, 289 n.4 (noting conflict in Circuits); 6th and 11th Circuit decisions cited at p. 19 of Petition for Certiorari.

[2] Similarly, when the Indiana Supreme Court resolved the instructional issue against Defendant, it did not mention *Sandstrom*, which was decided while Defendant's appeal was pending. See fn. 4, p. 3, *infra*.

forded Defendant. Although, as Respondents point out, the intervening decisions do not directly alter the law *re* "harmless error," any harmless error determination is necessarily affected by whether the tribunal making the determination comprehends that the error is indeed a grave, constitutional error.

We are constrained to remind that the laypersons on the jury must have been persuaded by the unconstitutional evidence and argument,[3] that defendant was sane, based on his invocation of right to counsel. This is unconscionable.

II.

Respondents fail to comment on defendant's position that the Seventh Circuit's decision in his case puts that Court in conflict with the Sixth and Eleventh Circuits. (See Pet. pp. 18-19.) In those Circuits, the instructional error cannot be harmless in the insanity context.

III.

Respondents fail to consider the interrelationship between the two constitutional errors claimed by defendant,[4] treat-

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[3] It must be remembered that not only was the unconstitutional evidence presented; the prosecutor argued that defendant's invocation of right to counsel demonstrates his sanity. (Tr. 611).

[4] As to the instructional issue, Respondents point out that not all the instructions complained of were objected to at the time. (Br. in Opp. p. 7) See Pet. p. 16, fn. 18 for "anticipatory reply." Additionally, the Indiana trial court had admonished counsel not to make any more objections, which must operate to nullify any "waiver" principle.

Moreover, although Defendant called *Sandstrom* to the Indiana Supreme Court's attention, that Court did not mention *Sandstrom v. Montana*, 442 U.S. 510 (1979), which was decided while Defendant's direct appeal was pending and before the Indiana Supreme Court affirmed. *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979).

ing each as if in a vacuum for purposes of discussion—even of the "harmless error" aspects of the case. (See Pet. pp. 19-20.)

IV.

In determining whether the constitutional error(s) at bar can be deemed "harmless," this Court should consider the content of the expert testimony (see Pet. App. D, p. App. 25), supporting a finding that defendant was not sane (*i.e.*, not criminally responsible), to assess whether the pro-sanity evidence logically outweighed the insanity evidence, or whether—as we maintain—the verdict of guilty (*i.e.*, determination of sanity) was influenced by the jury's exposure to evidence and argument that defendant invoked his right to counsel.

While the psychiatrists who opined defendant was insane based their opinions on identifiable facts, (see Dr. Adams, Tr. 725-26, 787, 796-97; Dr. Yuhn, Tr. 869-78), no such factual bases were testified to for the sanity opinions of the other doctors. (Dr. Urruti, a psychiatrist, and Dr. Westfall, a general practitioner, did not testify to any factual bases for their opinions). And Dr. Hogle, a psychiatrist, who had "no opinion" as to defendant's sanity, had substantial doubts whether he was sane at the relevant time.

Considering the appropriate weight these opinions should be afforded when judged by the factual bases (or lack thereof) to which the respective doctors testified, the Seventh Circuit's harmless error determination[5] cannot be upheld.

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[5] Of course, the applicable standard for whether a constitutional error can be deemed "harmless" is whether the prosecution has proven "beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For the reasons advanced in the Petition for Certiorari, as amplified in this Reply, certiorari should be allowed; and, on the merits, this Court should issue the Great Writ of Habeas Corpus.

Respectfully submitted,

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